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EXCEPTION

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AZ CORP COMMISSION
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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL, Chairman; JIM
 IRVIN, Commissioner; MARC L. SPITZER,
 Commissioner;

DOCKET NO. S-03438A-00-0000

**RESPONDENTS' EXCEPTIONS
 TO RECOMMENDED OPINION
 AND ORDER**

In the Matter of:

THE CHAMBER GROUP, INC.; CHAMBER)
 FINANCIAL GROUP, CHAMBER FINANCIAL,)
 JOSEPH L. HILAND, TYSON J. HILAND AND)
 TRAVIS D. HILAND,)

Respondents.)

Pursuant to R14-3-110(B) of the Arizona Administrative Code, and based on the
 recommended opinion and order ("Opinion") issued by the Administrative Law Judge in this matter
 on December 4, 2001, Respondents submit their exceptions to certain portions of the Opinion.

DISCUSSION

I. THE CERTIFICATES OF DEPOSIT ARE EXEMPT SECURITIES

The exceptions filed by the Securities Division simply misunderstand securities law in
 Arizona. Arizona has a rather firm dichotomy between registration offenses and fraud offenses.
 Registration offenses are strict liability offenses (*see* A.R.S. § 44-1841); anti-fraud violations are not
 strict liability offenses (*see* A.R.S. § 44-1991).

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1 The Securities Division wrongly asserts that anti-fraud claims should be seen as strict liability
2 offenses. To support this, it relies on *State v. Gunnison*, 127 Ariz. 110, 618 P.2d 604 (1980). *State v.*
3 *Gunnison*, however, is a criminal action in which the ultimate holding of the case is that scienter is
4 required for a finding of criminal securities fraud. The other two cases cited by the Division carefully
5 limit their holdings to civil actions for damages. *Rose v. Dobras*, 128 Ariz. 209, 624 P.2d 887 (App.
6 1981); *Aaron v. Fromkin*, 196 Ariz. 224, 994 P.2d 1039 (App. 2000).

7 This proceeding is an administrative proceeding for injunctive relief, fines and restitution. The
8 Division sought a cease and desist order for alleged violations of the Arizona Securities Act. As such,
9 it is not analogous to either a civil action for damages or a criminal action such as in the cases cited
10 by the Division. Rather, it is most analogous to an SEC administrative action for injunctive relief
11 finds and restitution. Federal courts reviewing such actions hold that fraud findings rest within the
12 sound discretion of the trier of fact and the mere allegation of negligence does not mandate a finding
13 of fraud. *SEC v. Pros International, Inc.*, 994 F.2d 767 (10th Cir. 1993).

14 In stark contrast, registration violations are strict liability offenses. Given the nature of such
15 offenses, careful consideration must be given by the Commission as to whether or not the programs
16 described are "securities." Significantly, the Commission must ask whether or not the nature of the
17 activity is such that it should fall within the scope of the Commission's regulation. Moreover, careful
18 scrutiny must be given to the security statutes to determine whether or not they constitute securities
19 and whether or not they are subject to any exemptions. The certificates of deposit are exempt from
20 registration when this analysis is applied.

21 While the certificates are deposit are securities, they are clearly exempt from registration.
22 A.R.S. § 44-1843 exempts the following securities from registration:

- 23 (1) Securities guaranteed by the United States. A.R.S. § 44-1843(A)(1); and
24 (2) Securities issued by a national bank. A.R.S. § 1843(A)(2).
25
26

1 These certificates satisfy both exemptions. The evidence at the hearing revealed that all of the
2 certificates of deposit at issue in the proceeding were issued by national banks and insured by the
3 F.D.I.C. As such, they were both guaranteed by the United States Federal Government *and* issued by
4 national banks. Either of these exemptions would have demonstrated that these programs were exempt
5 from securities registration. Both were present, and a finding of registration violations with regard to
6 the certificates of deposit could not be supported.

7 **II. THE TAX LIEN CERTIFICATES WERE ALSO EXEMPT FROM REGISTRATION**

8 Similar to the certificates of deposit, the tax lien certificates fall within an express exemption
9 to the act. A.R.S. § 44-1843(A)(10) exempts notes secured by a deed of trust on real estate from the
10 provisions of the act. The evidence at the proceeding were uncontroverted that the tax lien program
11 involved an investment of money in notes that were secured by deeds of trust on real property. As
12 such they were exempt securities and no registration violations could be found on such instruments.

13 **III. THE MONEY VOUCHER PROGRAM IS NOT A SECURITY**

14 The classic definition of security under Arizona law is set out in *SEC v. W. J. Howey Co.*, 328
15 U.S. 293 (1946) and was applied in Arizona by *Rose v. Dobras*, 128 Ariz. 209, 624 P.2d 887 (App.
16 1981). A security involves (1) an investment of money (2) in a common enterprise (3) with the
17 expectation they will earn a profit solely through the efforts of others. Two of these elements are not
18 satisfied by the money voucher program. At trial, the evidence regarding the money voucher program
19 revealed that a person investing in the program actually purchased an individual money voucher
20 machine. As such, there is no "common enterprise." Money is not pooled in any way. Rather, a
21 person's funds specifically go to the purchase of a money voucher machine.

22 Moreover, the expectation of profits does not come solely through the efforts of others. The
23 individual purchasing a money voucher machine expects profits from the operation of the machine.
24 This machine constitutes their own personal asset, and, as such, the income is derived from an asset
25 owned by the investor, not by the efforts of others.
26

1 Under the standards for security in Arizona, the money voucher program is simply a
2 non-security. No registration violations can be found on such an instrument.

3 **IV. ONLY MINIMAL REGISTRATION VIOLATIONS CAN BE FOUNDED UPON THE**
4 **VIATICAL SETTLEMENTS**

5 Based on the recent case of *Siporin v. Carrington*, 347 Ariz. Adv. Rep. 5 (App. 2001),
6 viatical settlements are securities in Arizona even if they were sold prior to the adoption of
7 amendments to the Securities Act which formally added viatical settlements to the definition of
8 security. The *Siporin* case is currently pending review by the Supreme Court and may be reversed.
9 Until such time, the Court of Appeals' opinion is precedent in Arizona.

10 The facts at the hearing, however, revealed that for all sales of the viaticals, save perhaps two
11 or three, Respondents were registered securities salesmen in conformity with the Arizona Securities
12 Act. The steep penalties imposed for violations for registration as a salesman cannot be justified by
13 two or three violations of A.R.S. § 44-1842. Moreover, even if the Supreme Court ultimately affirms
14 the *Siporin* case, it should be noted that prior to *Siporin*, the statement of the law that was available to
15 anyone who researched the issue was a D.C. Circuit case which held that viaticals were not
16 securities. It was extremely reasonable for careful businessmen to rely on federal precedent which
17 held that they were non-securities. Under such circumstances, the fines and restitution order imposed
18 by the recommended order cannot be justified.


19 Given the factual circumstances described herein, the registration violation should be lessened
20 to \$20,000 and the investment advisor registration fines should be lowered to \$5,000.

21 **CONCLUSION**

22 For the reasons outlined above, Respondents hereby request that the Commission modify the
23 Opinion by adopting and incorporating herein the proposed amendments specified in the attached
24 Exhibit "A," together with any other relief that the Commission, in its discretion, deems appropriate
25 and authorize by law.
26

1 RESPECTFULLY SUBMITTED this 27th day of December, 2001.

2 **TITUS, BRUECKNER & BERRY, P.C.**

3 By 
4 David R. Jordan
5 Christopher D. Lonn
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9 Attorneys for Respondents

10 ORIGINAL and TEN (10) COPIES
11 of the foregoing filed
12 this 27th day of December, 2001, with:

13 Docket Control
14 Arizona Corporation Commission
15 1300 W. Washington
16 Phoenix, Arizona 85007

17 COPY of the foregoing hand-delivered
18 this 27th day of December, 2001 to:

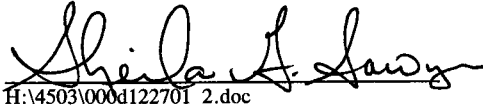
19 Mark Stern, Administrative Law Judge
20 Arizona Corporation Commission/Hearing Division
21 1200 W. Washington
22 Phoenix, Arizona 85007

23 COPIES of the foregoing mailed
24 this 27th day of December, 2001 to:

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EXHIBIT A

THIS AMENDMENT:

_____ Passed	_____ Passed as amended by _____
_____ Failed	_____ Not Offered _____ Withdrawn

RESPONDENTS' PROPOSED AMENDMENT # 1

TIME/DATE PREPARED: 4:00 p.m., 12/27/01

MATTER: The Chamber Group, Inc., et al

AGENDA ITEM NO. ____

DOCKET NO.: S-03438A-00-0000

OPEN MEETING DATE 01/08/02 – 01/09/02

Page 2, line 22:

DELETE (after “by”): “Titus, Bruckner & Barry, P.C.”

INSERT: “Titus, Brueckner & Berry, P.C.”

Page 7, line 15:

INSERT (after “June 2000,”): “one or more of”

Page 7, lines 20-21:

DELETE (after “witnesses including.”): “Mrs. Gloria Peragenie”

INSERT: “Ms. Gloria Perry Peragine”

Page 7, line 26:

DELETE: “Mrs. Gloria Peragenie”

INSERT: “Ms. Gloria Perry Peragine”

Page 7, line 28:

DELETE (after “bank issued CDs.”): “Mrs. Peragenie”

INSERT: “Ms. Gloria Perry Peragine”

RESPONDENTS' PROPOSED AMENDMENT # 1
(CONT')

Page 8, line 7:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 9:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 12:

DELETE (after "It was"): "Mrs. Peragenie's"

INSERT: "Ms. Gloria Perry Peragine's"

Page 8, line 16:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 19:

DELETE (after "disclose to"): "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 8, line 22:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

RESPONDENTS' PROPOSED AMENDMENT # 1
(CONT')

Page 8, line 27:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 9, line 1:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 9, line 4:

DELETE (after "After one year,"): "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 9, line 10:

DELETE (after "September 6, 2000,"): "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 30, line 14:

DELETE: "Mrs. Peragenie"

INSERT: "Ms. Gloria Perry Peragine"

Page 30, line 16:

DELETE: "Kathryn Smith"

INSERT: "Ms. Catherine Smith"

///

///

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THIS AMENDMENT:

_____ Passed _____ Passed as amended by _____
_____ Failed _____ Not Offered _____ Withdrawn

RESPONDENTS' PROPOSED AMENDMENT # 2

TIME/DATE PREPARED: 4:00 p.m., 12/27/01

MATTER: The Chamber Group, Inc., et al

AGENDA ITEM NO. _____

DOCKET NO.: S-03438A-00-0000

OPEN MEETING DATE 01/08/02 – 01/09/02

Page 6, line 22:

DELETE: "There is no evidence"

INSERT: "There is evidence"

Page 7, line 12:

DELETE: "Respondents presented no evidence"

INSERT: "Respondents presented evidence"

Page 12, line 1:

DELETE: "Respondent Tyson Hiland failed to disclose"

INSERT: "Respondent Tyson Hiland did not need to disclose"

Page 18, line 8:

DELETE: "Respondent Tyson Hiland failed to disclose"

INSERT: "Respondent Tyson Hiland did not need to disclose"

RESPONDENTS' PROPOSED AMENDMENT # 2
(CONT')

Page 18, line 9-10:

DELETE: "Respondent Tyson Hiland also failed to disclose"

INSERT: "Respondent Tyson Hiland did not need to disclose"

Page 36, line 8:

DELETE: "were not exempt" and "Indeed"

INSERT: "were exempt"

Page 36:

DELETE: lines 9, 10, 11, 12 and 13

Page 38, line 1:

DELETE: "113,100"

INSERT: "20,000"

Page 38, line 6:

DELETE: "20,000"

INSERT: "5,000"

Page 38, line 11:

DELETE: ", tax lien certificates"

INSERT: "and"

Page 38, line 12:

DELETE: "money voucher machine programs"

**RESPONDENTS' PROPOSED AMENDMENT # 2
(CONT')**

Page 38, line 14:

DELETE: "securities"

INSERT: "viatical settlements"

Page 39:

DELETE: lines 2, 3, 4, 5 and 6

Page 39, line 10:

DELETE: "56,550" in both instances

INSERT: "10,000"

Page 39, line 24:

DELETE: "20,000"

INSERT: "10,000"

Page 40, line 9:

DELETE: "56,550" in both instances

INSERT: "10,000"

Page 40, line 21:

DELETE: "20,000"

INSERT: "10,000"

Page 40:

DELETE: lines 22, 23, 24, 25, 26, 27 and 28

RESPONDENTS' PROPOSED AMENDMENT # 2
(CONT')

Page 41:

DELETE: lines 1, 2, 3 and 4

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